SYNOPSIS

Health is considered to be man's most valuable asset since all his activities depend on the state of his health. Health has been defined by the World Health Organization (WHO) as a state of complete physical, mental, and social well being and not merely the absence of disease or infirmity.(Disease implies absence of ease or comfort). According to Chambers Twentieth Century Dictionary , the meaning of the word disease is "uneasiness or a disorder or want of health in mind or body or ailment."

The word health is changing in its contents radically after the World Health Organisation defined the term positively as ''a state of complete physical, mental and social well being, and not just the absence of diseases and illness . As per the Constitution of the World Health Organisation, every one has a right to have the highest standard of Health. Such a fundamental right shall be available to all without distinction of race, religion and political belief, economic or social conditions. And also that health of all people is fundamental to the attainment of peace and security. After the establishment of the World Health Organization, the right to health care was recognized internationally, and various international conventions recognized the importance of the right to health care .The objective of the organization is declared as the attainment by people, of the highest possible level of health .

Recognition of the right to life to live with dignity is the basic premises on which human rights law rests. Living with dignity calls for providing adequate opportunity to develop, to all the individuals, irrespective of the caste, creed, sex and place of birth. All the international conventions on human rights seeks to promote right to live with dignity, and the philosophy behind all human right laws will be meaningless, unless medical services are made available to all. The preamble to the constitution of the World Health Organisation makes this clear.

The term 'deficiency' in medical services should extend beyond the doctrinal definition of the term given under the Consumer Protection Act,1986 for the purpose of promoting human rights . The foundation of this term in fact stems from the International Organisation For Consumer Unions (IOCU) and the United Nations Guidelines on Consumer Protection . If deficiency in the medical services is examined in the light of the principles it can be identified that the following circumstances are leading to deficiency in medical services. (1) Denial of access to health service which include access to basic medical services (2) Denial of access to advanced medical treatments which may be life saving procedures. Failure to provide safety of products in health care services, experimental medicines and clinical trials on human beings and abuse of diagnostic and curative procedures may also lead to human right violations. Denial of health care records, commercial trade of human organs and researches involving human embryo or human cells also need to be evaluated

in the context of human rights law principles.

The profession of medicine has immensely benefited mankind. Medical service is defined as assistance or benefits pertaining to medicine or its practice offered to another, in the performance of healing disease for the purpose of cure. It should be clear, therefore, that medical services imply delivering quality medical care to the community (ie, service of mankind , in treating and curing .

Medical service means the services rendered by the hospitals (both Government and Private), nursing homes, health centers, clinics, medical practitioners (physicians, surgeons, and those practicising, Auyurvedic, Homeopathic or any other system of medicine or surgery), chemists, diagnostic centers, paramedical staff, nursing staff, and other allied staff.

The question of professional duty to take care of health has immense significance in the present day world. The WHO is committed to provide health for all. The Directive Principles of State Policy under the Constitution of India demands the State to make effective provision for public health, and for just and humane conditions of work .It is the primary duty of the State to raise the level of nutrition, the standard of living of its people and the improvement of public health .The Supreme Court has declared that right to medical aid as an integral part of the right to life. It is an obligation on the State to preserve life by extending the necessary medical assistance. In fact, the Apex Court has held that right to health and medical care is a fundamental right under the Constitution of India.

Practice of medicine is rendering great service to the society. It is, therefore a noble profession. Traditionally, the family doctor was considered to be a friend, philosopher and guide for the sick. The relationship between the patient and the doctor was considered as very sacred; it is based on mutual trust and faith, and it is not mercenary. Increased mechanisation and commercialisation of the profession has brought an element of dehumanisation in medical practice. Health care has now been reduced to a business which determines the patient- doctor relationship.

Today it has almost diminished its fiduciary character. ‘Services’ of medical establishments are purchasable commodities and the ‘business’ mind has given an impetus to more and more malpractices and instance of negligence. It is not surprising that most of the nursing homes are not even owned by doctors, but by businessmen and promoters. There are so many stringent legislations which can check malpractice but the procedures are long and of general apathy.

At present, the medical profession has become commercialised. Practitioners are adopting deceitful methods to attract the innocent patients and thereby procuring money. Some doctors suggest their patients to undergo various tests, that too in a particular laboratory which are in fact, unnecessary. This is particularly so when there is an unethical collusion between that laboratory and the doctor. There are other doctors who prescribe more medicines than necessary on the letter pad of a particular medical shop. There may also exist some understanding between doctor and

pharmaceutical companies for prescribing their product. The medical profession is a noble profession and it should not be brought down to the level of a simple business. Today in India, many doctors (though not all) have become totally money-minded, and have forgotten their Hippocratic Oath. Since most people in India are poor, medical treatment is becoming more and more inaccessible.

Doctors need scientific knowledge, technical skill and understanding. Those who use these with courage, with humility, with wisdom and in accordance with medical ethics provide a unique service to their fellow men and women, and build an enduring edifice of character within themselves. Doctors shoulder the trust of the patient. A patient approaches him with all confidence and in hope that he will cure him of his ailments. It is the duty of the doctor to fulfill his obligations with proper care.

With an idea of protecting the consumers the legislature has enacted the Consumer Protection Act, 1986 to arm each and every consumer and /or consumer associations with rights to seek speedy, cheap and efficacious remedies which is proving to be very popular and effective as well, leaving behind a trail of rulings and findings under which so many people have benefited.

Consumer complaints are growing at a fast rate of 15-20%. But at the same time patients belonging to the lower income groups or those who are illiterate, do not get the benefit of the Act. Doctors often get away with their act of negligence, because the patients neither have the medical knowledge nor sufficient evidence to fight his case. All these situations are favourable to the doctors and corporate medical firms

It is high time that good sense prevails and the learned members of this noble profession themselves suggest some plausible and effective measures to check malpractices so that propriety and professional dignity is not put at stake. To start with, the Consumer Protection Act and also other related laws can be modified and reformed by integrating crucial provision in it. For example- there should be a mandatory scrutiny of all cases before the same is put into trial. This scrutiny should be done by medical experts and only such cases which are *prima facie* act of negligence should be subjected to the summary jurisdiction of Consumer Forum. It is also envisaged that while trying such disputes the Forum should comprise an additional member from the medical field so that the evidence is adduced and judged in a proper perspective. Another option is to fix one or two days in a month when the Forum would hear only cases of medical negligence, before a panel of medical experts who may act like a jury, to pronounce judgment on any issue of medico-legal importance. Further it must be made obligatory on the part of medical men to maintain records of their indoor patients for a period of three years and on demand furnish the same within 72 hours. Most of the misunderstanding and misconceptions based on mistrust would be resolved if medical records are provided to the patients or their descendents on time.

The aforesaid modification in the substantive and procedural part of the statute would, *inter alia,* ensure two things. One, that false and malicious cases would not see the light of day. Two, genuine claims will not fail for want of proper testimony. These two things put together would pave the way for more confidence and trust between the doctors and patients on the one hand and between doctor –patient and the administration of consumer justice on the other.

This century has been the rapid advancement of medical technology and evolution of hospitals into modern health providing business center. A profession as distinguished from trade is based on high ethical standards. Medicine has its own ethical parameters and code of conduct. This profession is rendering a noble service to humanity and has public trust. Any person or professional who serve the public has to do its duty, not as a matter of contract, nor in consideration of the fee, but as an organized public service. The principle of public service is a major component of all profession and medical profession cannot be an exception to it.

It was believed that a man of medicine is a missionary and so he takes the oath of service to the suffering human beings, in return receiving subsistence and satisfaction. However, today like everything else in this society, Hippocrate's noble profession stands commercialised. A section of medical practitioners seems to be propelled by greed more than the desire to serve suffering humanity. There are some doctors who have become casual and insensitive to their professional protocols. Thus, more medical negligence cases are reported in day to day life.

Therefore, if there is any delinquency, culpability, deviancy, rashness or negligence on the part of a doctor while treating a patient, should the law allow him to use the benefit of alibi of his professional status? Any person who deals with public owes a duty to care. Thus the medical profession owes to the community a greater degree of care, more vigilance and higher responsibility in the cause of service or practice. Thus, it would be unfair for a doctor to claim immunity from liability or even criminal action, if rashness, grave negligence and turpitude are made out against him.

In India, majority of citizen requiring medical care and treatments belong to low income groups and most of them are illiterate or semi-literate. They do not even understand the functions of various organs or the effect of removal of such organ. They do not have access to effective but costly diagnostic procedures. Poor patients lying in the corridors of hospitals after admission or a mere examination, is a common sight. For them, any treatment with reference to rough and ready diagnosis based on their outward symptoms and doctors experience or intuition is acceptable and welcome as long as it is free or cheap; and whatever the doctor decides as being in their interest, it is usually unquestioningly accepted. They are a passive, ignorant folk uninvolved in treatment procedures.

The poor and needy face a hostile medical environment- inadequacy in the number of hospitals or beds, non-availability of adequate treatment facilities, utter lack of qualitative treatment, corruption, callousness and apathy. Many poor patients with serious ailments (eg. heart patients and cancer patients) have to wait for months for their turn even for diagnosis, and due to limited treatment facilities, many die even before their turn comes for treatment. What choice do these poor patients have? Any treatment of whatever degree is a boon or a favour, for them. The stark reality is that for a vast majority in the country, the concept of informed consent or any form of consent, and choice in treatment, has no meaning or relevance.

On the other hand, we have doctors, hospitals, nursing home and clinics in the commercial sector. There is a general perception among the middle class public that these private hospitals and doctors prescribe avoidable costly diagnostic procedures and medicine, and subject them to unwanted surgical procedures, for financial gain. The public feel that many doctors who have spent a crore or more for becoming a specialist, or nursing homes which have invested several crores on diagnostic and infrastructure facilities ,would necessarily operate with a purely commercial and not service motive ; that such doctors and hospitals would advice extensive costly treatment procedures and surgeries, where conservative simple treatment may meet the need; and what used to be a noble service-oriented profession is slowly but steadily changing into a business. Every doctor wants to be a specialist. The proliferations of specialist and super specialist have exhausted many a patient both financially and physically, by having to move from doctor to doctor, in search of the appropriate specialist who can identify the problem and provide treatment. What used to be competent treatment by one general practitioner has now become multi-prolonged treatment by several specialists.

When law steps in, to provide remedy for negligence or deficiency in service by medical practitioner, it gives rise to twin adverse effects. More and more private doctors and hospital have, of necessity, started playing it safe, by subjecting or requiring the patients to undergo various costly diagnostic procedure and test to avoid any allegation of negligence, even though they might have already identified the ailment with reference to the symptoms and medical history with 90%certainty,by their knowledge and experience. Secondly, more and more doctors particularly surgeons in private practice are forced to cover themselves by taking out insurance, the cost, of which, is also ultimately passed onto the patient, by way of higher fee. The nature of doctor –patient relationship is on the basis of trust. The extent and nature of information required to be given by doctors should continue to be governed by the Bolam test rather than the “reasonably prudent patient” test evolved in Canterburry . It is for the doctors to decide, with reference to the condition of the patient, nature of illness, and the prevailing established practices, how much information regarding risks and consequences should be given to the patient.

A doctor shall abide by the oath through out his careeir. If a doctor fails to fulfill any of these promises, he will be liable for professional misconduct and liable for removal from the rolls. And they will also be liable for medical negligence under the Consumer Protection Act, 1986.

The hospitals are equally liable for the acts of the para medical staff and /or its doctors. Nursing homes may also be held negligent if nurses fail to execute instruction delivered to them at the time of treatment. In *Achutrao Haribhau Khodwa*. v. *State of Maharashtra (*1996 (2) SCC 634) , the Supreme Court held that ,the State is liable for acts of negligence committed by doctors in a government- run hospital.

Supreme Court of India in *Indian Medical Association* v. *V.P.Shantha's* case (111 (1995) CPJ 1 (SC); 1995 (3) CPR 412:1995 (6) SCALE 273:1996 CCJ 1 (SC)), held that the medical profession is included within the meaning of service under consumer law. Protest against this decision arose from different corners but the court confirmed their stand.Thus medical service comes under Consumer law. No doubt, due to this decision, the doctors became more cautious in treatments and a form of defensive medication slowly took over. In such cases, the patients would be advised to undergo several tests even before the preliminary diagnosis, so as to obviate any litigation against doctors. The ultimate sufferer is the patient himself as the treatment becomes expensive and there is a delay in initiating the treatment.

Professional negligence, more specifically, medical negligence is, as the term suggest, related to the medical profession and is the result of some irregular conduct on the part of any member of the profession or related services in discharge of professional duties. But first of all, it is important to highlight the concept of negligence itself so as to enable the readers to analyse the peculiar problems in the right perspective having regard to the diversification of the professional activities prompted by unprecedented advances in the practice of the profession and the subject of medicine and surgery as such and the inherent commercialization of various branches thereof which are rendering all kinds of services to the public at large.

This issue has created complicated problems in the society and health care system and hence this area was selected for the study. The study solely depends on secondary data available in the forms of reports, articles, studies and surveys conducted by the Government and non-Government agencies. Further, legislations, government reports etc have also been extensively and exhaustively referred.

The main objective of the study is to highlight the predominant drawbacks of the existing medico-legal system. For example judges of the consumer courts are not experts in medical science; this itself causes difficulty for them in deciding cases relating to medical negligence. Moreover, judges have to rely on testimonies of other doctors which may not be objective in all cases. Like in all professions and services, doctors too sometimes have a tendency to support their own colleagues.

The testimony may be difficult to understand, particularly in complicated medical aspects and to a layman in medical subject. A balance has to be maintained in such cases. The doctors who cause death or agony by medical negligence should certainly be punished, but it should also be remembered that like any other profession, the doctors too can make errors of judgment, and if they are punished for every error no doctor can practice his profession. Indiscriminate proceeding and decisions against doctors are counter productive and serve no good. They inhibit the free exercise of judgment by a professional in a particular situation.

According to present legal position, a medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fall below that of the standards of a reasonably competent practitioner in his field. For instance, he would be liable, if he leaves surgical gauze inside the patient after an operation. There may be few cases where an exceptionally brilliant doctor performs an operation or prescribes a treatment which has never been tried before, to save the life of a patient when no known method of treatment is available. If the patient dies or suffers some serious harm, should the doctor be liable? In such situation he should not be held liable. Science advances by experimentation, but experiments sometime end in failure e.g. the operation on the Iranian Siamese twin or the first heart transplant by Dr. Barnad in South Africa. In such cases it is advisable for the doctor to explain the situation to the patient and take his written consent. Several instances of negligence are reported from government hospitals too. But unfortunately the consumer law is silent here as government hospital comes under the “non-paid” service. Thus several loopholes exist.

For the purpose of study, this thesis has been divided into 9 chapters. The 1st chapter is an introductory chapter. In this chapter, an attempt is made to define and analyze the need for an effective law for controlling medical negligence cases. It provides a breakthrough to the entire thesis. It discusses the root causes of the problem and its impact.

The second chapter discusses the historical evolution of medical negligence law in India and under the common law concept. It also narrates the constitutional perspective of right to quality medical care and its evolution under medical law. Further the chapter makes an exhaustive analysis of the various international conventions and instruments adopted by the international community to establish and mould the right to health care.

The third chapter provides information relating to various common law liabilities under medical negligence. The main liabilities like Penal, tortious, contractual and corporate liabilities are discussed to provide a better understanding of medical negligence jurisprudence.

The fourth chapter discusses medical liability in the light of medical ethics. This chapter focuses on various problems relating to confidentiality, disclosure of information and medical ethics. It concludes by discussing the enforcement mechanism adopted by the various countries like England, America and India.

The next chapter discusses the consumer liability in medical negligence cases. Here the discussions are focused on consumer liability in UK and America. This chapter also provides a comprehensive picture of Indian Consumer Protection Act with reference to “deficiency of services”.

Sixth chapter deals with enforcement mechanism under consumer law. It makes a comparative study of enforcement mechanisms available in England and America. The consumer courts in India have also been discussed, emphasing on their merits and demerits and also making suggestion for changes that can be incorporated into the system.

The seventh chapter is exclusively dedicated to the development of law through judicial decisions. The chapter focuses on the development of law in England, America and India through case study. The eight chapter deals with evolution of medical jurisprudence through existing laws and judicial decisions. The existing laws and judicial decisions have contributed substantially to the evolution of medical jurisprudence in India. The eight chapter makes a study of how this has happened and also discuses the outcomes. Ninth chapter is the concluding chapter which contains the suggestions to overcome the existing problem in the field of medical profession and make it worthy of its name.